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Analyzing Prison Sex: Reconciling Self-Expression with Safety

by Brenda V. Smith

THIS ARTICLE EXAMINES the complexity of prison sex and the challenges that it raises in the context of recently enacted United States legislation, specifically the Prison Rape Elimination Act (PREA).¹ It begins by identifying a range of prisoner interests in enhanced sexual expression. These interests are described below in an attempt to disentangle prisoners' rights in sexual expression from states' legitimate interests in regulating that expression. This article also directs policymakers and decision makers to mine international documents and human rights norms that recognize the necessity of punishment and at the same time outline a standard for the safety of individuals in custody, the protection of human dignity, and the acknowledgement of the right to sexual self-expression. Ultimately, many prisons do not have legitimate interests in prohibiting prisoner sexual expression and should use their scarce resources to protect prisoners from non-consensual and coercive sex by staff or other inmates.

ities for failure to implement or develop national standards.⁵ As an incentive to comply with its provisions, PREA provides grant assistance to states to implement practices that reduce, prevent, or eliminate prison rape.⁶

PREA does not change the traditional definition of rape.⁷ It does, however, recognize that sexual assault can be accomplished not only by actual force but also through fear and intimidation. Additionally, PREA gives BJS authority to create another definition of rape for purposes of conducting its statistical analysis and review of the prevalence of prison rape.⁸ This distinction is very important because BJS has chosen to collect data on a broader range of sexual conduct — nonconsensual acts, abusive sexual contact, staff sexual misconduct, and staff sexual harassment — than that covered by legal definitions of rape.⁹ BJS data collection includes inmate-on-inmate conduct, as well as staff-on-inmate conduct. This data will come from a variety of sources, such as records, reviews of correctional agencies, victim self-reports while

“In prison, sex is valued because it is highly desired and forbidden. Therefore, prisoners use sex as a commodity to gain access to items they would not have access to otherwise. Prisoners engage in sexual practices in exchange for common items like cigarettes, candy, chips, or a phone call.”

THE PRISON RAPE ELIMINATION ACT OF 2003

IN 2003 THE UNITED STATES Congress unanimously passed the Prison Rape Elimination Act. PREA establishes “zero tolerance” for rape in custodial settings, requires data collection on the incidence of rape in each state, and establishes a National Prison Rape Elimination Commission (Commission). The Commission is required to issue a report on the causes and consequences of prison rape and to develop national standards on the prevention, detection, and punishment of prison rape.² PREA creates a system of incentives and disincentives for states, correctional agencies, and correctional accrediting organizations that fail to comply with its provisions. Correctional agencies must, upon request by the Bureau of Justice Statistics (BJS), report the number of instances of sexual violence in their facilities.³ The three states with the highest incidence and the two states with the lowest incidence of prison rape must appear before the Review Panel on Prison Rape to explain their designation.⁴ States and accrediting organizations stand to lose five percent of federal funds for criminal justice activ-

in custody, and surveys of former and soon-to-be released inmates.¹⁰ Yet, any discussion of rape necessarily includes a discussion of consent. Recognizing the complexity of sexual behavior in correctional settings, the proposed BJS National Inmate Survey also asks about consensual sex.¹¹

BJS data collection has prompted discussions among stakeholders about the nature of consensual sexual interactions in prisons between inmates and between staff and inmates. Although correctional officials, advocates, and prisoners are clear about the need to end prison rape, there are other more complex agendas. Correctional authorities are interested in minimizing the number of sexual interactions between inmates that can be defined as rape¹² to lower their numbers for purposes of BJS data collection and to limit their potential legal liability for prison rape.

Human rights organizations are concerned that correctional authorities will respond to PREA by strictly enforcing existing prison policies that prohibit all sex between inmates and in some instances all sexual expression, including masturbation. This retrenchment could result in discipline or criminal prosecution for prisoners who engage in consensual sex.¹³ Further, they are concerned that the acknowledgment of consensual sex in correctional settings will allow prison authorities to cast rapes as consensual,

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thereby reducing the number of rapes reported to BJS and the attention paid to investigating and disciplining perpetrators.

Lastly, prisoners are rightfully concerned that although this heightened scrutiny may result in fewer assaults, it gives correctional authorities a potent tool to selectively sanction inmates for any sexual expression.¹⁴ Currently, prisoners engage in sexual activity with other prisoners and with staff. Although sexual relations with staff pose obvious risks, sex between offenders and their non-staff partners poses fewer risks and potentially more benefits. Prisoners are concerned that agencies, in their desire to comply with PREA, will allow even fewer spaces for sexual expression. They are also concerned that any act of self expression will be labeled an infraction and result in punishment.¹⁵

INMATES' INTERESTS IN SEXUAL EXPRESSION

MOST ADVOCATES AND CORRECTIONAL AUTHORITIES agree that sex between staff and inmates can never, as a legal matter, be consensual. Staff sexual interactions with inmates have the potential to affect prison safety and security. Both domestic law and international standards on prison practice recognize that there is an inherent power imbalance between staff and inmates.¹⁶ Correctional staff control every aspect of the prison experience. Moreover, there are many reported incidents of staff relationships with inmates resulting in escapes, death, and other issues that compromise the safety of other staff and inmates.¹⁷ Finally, as a policy matter, recognizing that staff and inmates can have consensual relationships puts the legitimacy of the state's care and custody of inmates in question. Sexual expression in prison from the prisoner's perspective, however, yields a different result. Prisoners have an interest in sexual expression separate from that of the state.

SEX FOR PLEASURE

In spite of society's sense of either the desirability or deservedness of prisoner sex, prisoners have an interest in sex for pleasure. Prisoners engage in a variety of sexual behaviors including masturbation, sex with other prisoners, visitors, and staff. Although these behaviors are prohibited by most state policies, arguably only sex with staff has potential to disrupt prison safety and security. The other three — masturbation, sex between prisoners, and sex with visitors — are not clearly a threat to safety and security, particularly if properly managed. In enforcing the prohibitions against all sex, correctional authorities miss opportunities to educate inmates about violence in relationships, safe sex, and to encourage healthy relationships that could offer support upon return to the community.

SEX FOR TRADE

In prison, sex is valued because it is highly desired and forbidden. Therefore, prisoners use sex as a commodity to gain access to items they would not have access to otherwise. Prisoners engage in sexual practices in exchange for common items like cigarettes, candy, chips, or a phone call. This system of bartering often occurs because there are not legitimate methods for inmates to gain access to those items or decrease desire for them.¹⁸ In other iterations of the exchange, prisoners who have desired items are exploited sexually and intimidated sexually for their goods. The prison's interest in safety and security suggests that sex for trade should be prohibited. The potential for violence is great because staff and inmates often do not deliver what they agreed to exchange.¹⁹ In these circumstances sex becomes less of a prisoner's choice and more of a commodity to obtain goods.

SEX FOR FREEDOM

For many prisoners sexual expression is a corollary of freedom. Whether imprisoned for short or long sentences, sexual expression, although limited, is one of the few acts that prisoners control. Making the choice to have sex when it is prohibited is an expression of freedom. The state should not regulate sexual freedom to the extent that it does not impede safety or security, as is clearly the case of staff-inmate sexual interactions.

SEX FOR TRANSGRESSION

In the non-incarcerative world, sexual expression can be a source of freedom. Often freedom of expression is closely associated with transgression — breaking rules, defying normative structures imposed by society, the state, and other institutions. Sexuality and gender are normative structures imposed by society.²⁰ Prisoners use sex to transgress these normative structures by defying society's constructs of gender and sexuality. Prison sex is also transgressive because it is against prison policies and rules. Sex becomes a prisoner's tool to thwart, control, embarrass, and harm those who control them within the confines of prison. Having sex with staff, a symbol of power, is the ultimate way to transgress because the prisoner has the potential to affect the state and prison's system of control.



SEX FOR PROCREATION

Procreation is another aspect of sexual expression that survives imprisonment.²¹ There are clear vestiges of early reformer and eugenic sentiments that criminals should not bear children for a variety of reasons.²² Yet both male and female prisoners often want to to conceive, aid in conceiving, and bear and raise children. Given the construct of U.S. prisons, where prisoners have very limited contact with their partner and existing children or lose custody of their children as a result of their imprisonment, conceiving or fathering children becomes the primary mode of this form of sexual expression.

A recent case, *Gerber v. Hickman*,²³ illustrates this point. A prisoner, William Gerber, who was serving life without parole, sought permission from the California Department of Corrections to provide, at his own expense, a sperm sample to impregnate his wife. A deeply divided *en banc* Ninth Circuit, over vigorous dissent, held that the right to procreate was inconsistent with imprisonment and that Mr. Gerber had no interest in inseminating his wife because he would never be able to leave prison to assist in rais-

ing the child.²⁴ Given that Mr. Gerber was not allowed conjugal visits,²⁵ his only remaining interest, considering his limited opportunities, was in providing the means for his wife to conceive a child. This was also one of the few remaining ways for him to express his sexuality. Mr. Gerber's solution — which did not involve physical contact, only collection of his sperm — was an appropriate and non-intrusive way to accommodate the exercise of his constitutional right to procreate while maintaining the prison's interest in security.²⁶

SEX FOR SAFETY

Concern for physical safety is a key motivator for sex between inmates and between inmates and correctional staff. Social scientists have identified the concept of protective pairing, when inmates have sex or become involved with someone to protect themselves from other inmates or staff.²⁷ Both legal and other nar-

appropriate.³⁴ A clear recognition in either written policy or procedure from prison officials that intimate relationships between inmates occur would provide the opportunity not only for inmates to express those relationships but would offer opportunities for corrections officials to explicitly address them in a manner congruent with their correctional mission of safety and security.

IMPLICATIONS FOR STATE REGULATION OF PRISON SEX

TAKING AS A GIVEN that sexual expression is a fundamental right,³⁵ should this fundamental right survive imprisonment? Unfortunately, the legal response is not promising. Court decisions set parameters for sexual expression that are marked by sterilization and abortion; the state cannot sterilize an inmate,³⁶ and the state must allow an inmate to obtain an abortion to the same extent that privilege is granted by the holding state.³⁷ The terrain in-between remains uncharted but seems terribly forbidding.

“Increasingly, United States courts have turned to international human rights law to enrich its impoverished constitutional rights jurisprudence. Both preventing sexual abuse and permitting greater sexual self-expression are congruent with international human rights instruments.”

ratives are replete with stories of prisoners having sex with other prisoners or with correctional staff to secure their safety.²⁸

Notwithstanding the passage of state laws, prisoners still receive little protection from forced and coerced sex. Although the full scope of sexual violence in prison is unknown,²⁹ reports from correctional officials³⁰ should cause concern. A recent study by BJS found that inmate perpetrators of sexual abuse were more likely to be sanctioned and prosecuted than staff perpetrators,³¹ and that even when staff are prosecuted, the sanctions they receive are minimal.³² Given the unlikelihood of receiving protection from either the corrections agency or the state through investigation, discipline, or prosecution, sex for safety with staff and other inmates is a reasonable response. Regulating sex for safety is an appropriate exercise of state authority because ultimately the state is obligated to protect inmates from harm.

SEX FOR LOVE

Often prisoners engage in sex for love or desire. Even in this setting where individuals are legally stripped of their autonomy and dignity and face violence from other prisoners and staff, prisoners manage to establish meaningful and loving relationships. Accounts of prison officials at all levels indicate that they are aware that sexual relationships between inmates occur and are part of the fabric of the correctional experience for both staff and inmates.³³ Still, the role of the state in limiting sexual relationships based on love between inmates is unclear. Correctional staff accounts indicate that they have already developed some tools to address these relationships, identifying, intervening, and disciplining when

Certain penological interests, however, would be served by enhanced prisoner self-expression. First, the Prison Rape Elimination Act requires correctional agencies to report all incidents of prison rape. Appropriately identifying acts that are consensual as opposed to coerced would permit corrections official to more accurately report information to BJS and meet the Act's data collection requirements. This would enhance national, state, and local interests in assessing prevalence and risk and in ineffectively deploying scarce investigative, medical, and administrative resources to address forced or coerced sex in prisons.

Second, policies that recognized and allowed greater prisoner expression would provide a greater range of categories for correctional officials to situate sexual behavior, which would result in an improvement over current policies that simply provide a blanket prohibition against sex.³⁸ Currently, correctional staff ignore or selectively enforce prison policies that prohibit sexual conduct, which fosters a culture of disrespect by both staff and inmates and calls into question the necessity for following other rules.³⁹ This policy change would enhance the credibility of correction agencies with both staff and inmates.

Third, sex in prison, whether consensual or non-consensual, poses serious health risks to the community.⁴⁰ For example, recent studies estimate that the rate of infection for hepatitis and HIV among the prison population is three times that of the general population and even higher among female inmates.⁴¹ Acknowledging that a broad range of sex occurs in correctional settings for a variety of reasons would enable prison officials to take appropriate health measures, such as condom distribution,

HIV/AIDS education programs, clinical trials, and specific interventions that target risk behavior in prison settings. This, in turn, would protect the health of staff, inmates, and the communities to which prisoners will return.

The fourth penological interest in recognizing and encouraging a broader range of sexual expression is the impact on prisoner community reentry. Strengthening and preserving family bonds are the goals for most conjugal and family visiting programs.⁴² These programs result in enhanced family support for inmates while they are serving their sentences and sustain important connections that they can return to once their sentence is complete. Inmates who have family support are less likely to re-offend and return to prison.⁴³ Many correctional agencies also use family and conjugal visits as an inmate management tool.⁴⁴ By explicitly regulating visitation, prison officials can control and implement it strategically to further correctional goals of safety, security, and rehabilitation.

Fifth, recognizing and granting inmates a degree of sexual expression may enhance inmate safety by decreasing prison rape.⁴⁵ By recognizing and regulating such conduct, states can better prevent incidences of violence and diseases associated with prison rape and help prisoners learn healthy and responsible sexual behavior prior to returning to their communities. These interventions have already been used in situations involving illegal sex (prostitution⁴⁶) and prohibited sex in other institutional settings (nursing homes, homes for the mentally retarded, and psychiatric settings).⁴⁷ Finally, permitting a greater degree of sexual expression recognizes the inherent dignity and autonomy of human beings, which also survives imprisonment.

HUMAN RIGHTS NORMS AND PRISON SEX

INCREASINGLY, UNITED STATES COURTS have turned to international human rights law to enrich its impoverished constitutional rights jurisprudence.⁴⁸ Both preventing sexual abuse and permitting greater sexual self-expression are congruent with international human rights instruments.⁴⁹

Several international instruments provide norms for the treatment of prisoners. Article 60(1) of the Standard Minimum Rules for the Treatment of Prisoners (SMR) provides that the "regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings."⁵⁰ Another source, Article 10 of the International Covenant on Civil and Political Rights (ICCPR),⁵¹ which the United States has ratified, provides that "all persons deprived of their liberties shall be treated with humanity and with respect for the inherent dignity of the human person." Finally, in the case of *Prosecutor v. Kunarac, et al.*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held that the act of rape, by definition, implies severe pain or suffering and constitutes torture when it is used to intimidate and coerce the victims.⁵² Under this definition, many instances of prison rape are a violation of the United Nations Convention Against Torture (CAT), to which the United States is a party.⁵³

In addition to these international instruments, the U.S. has ratified and is bound by regional human rights instruments as a member of the Organization of American States, including the American Declaration of the Rights and Duties of Man (Declaration) and the American Convention on Human Rights

(Convention). These instruments require the humane treatment of prisoners⁵⁴ and mandate that "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."⁵⁵

Unfortunately, the United States has a history of exceptionalism or opting out of human rights obligations.⁵⁶ The U.S. has limited the application of the ICCPR, the CAT, and regional instruments like the Declaration and Convention to its obligations under the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution.⁵⁷ These exceptions limit the formal structures for holding the U.S. accountable for compliance with international human rights norms but are still powerful and persuasive as practices and norms adhered to by other countries. The challenge is to use these norms to influence U.S. policies and practices.⁵⁸

Notwithstanding its exceptionalism and antipathy toward international law,⁵⁹ the U.S. like any other country is influenced by the practices of other countries. In the area of granting greater sexual expression to prisoners, however, the U.S. lags behind. Although the SMR is silent as to sexual relations, Rule 60(1), the principle of normalcy, "implies that sexual contact between prisoners and their partners should be allowed if [it] is possible under relatively normal conditions."⁶⁰ Many other countries permit sexual expression in institutional settings,⁶¹ define these visits under the rubric of either intimate or conjugal visits, and permit prisoners to have intimate and other contact with spouses, partners, and family.⁶²

For example, Brazil has implemented a "communal visit," which allows prisoners to visit with family and friends without physical restrictions, and an "intimate visit," which allows prisoners to receive visits from their partners or spouses in individual prison cells. In the Czech Republic, the director of the prison may allow married couples to visit in rooms specifically designated for intimate contact. It also allows prisoners to receive visits from four close relatives at a time. In Spain, inmates who cannot leave the institution may receive conjugal/intimate visits once a month for one to three hours. Finally, Denmark has implemented a "prison leave" system for prisoners with sentences greater than five months. The leave can last from one day to an entire weekend. Denmark "see[s] leave as a helpful tool in maintaining a stable atmosphere in the prisons and furthermore by keeping contact with relatives outside it is believed that fewer prisoners try to escape."⁶³ These leaves and visits enhance prisoner sexual expression by recognizing that sexual identity and expression are a core element of personhood. United States corrections agencies would enhance the safety of its prisons and inmates by doing the same.

CONCLUSION

THE DESIRE FOR SEXUAL INTIMACY and sexual expression is powerful and survives imprisonment. Individuals in custody, despite society's view, maintain their humanity and personhood. As Judge Posner has written, "[w]e must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration."⁶⁴ There is great benefit to acknowledging that inmates do not lose their sexuality once they enter prison and managing these interactions is part of the work required of corrections agencies. Moreover, appropriate intervention in these interactions can enhance the safety of inmates and staff, help agencies realize their correctional goals of providing safe and secure correctional envi-

ronments, and encourage the rehabilitation of inmates. This approach preserves scarce correctional resources for serious incidents of sexual violence that occur in institutional settings and enforces the dignity of prisoners. Although much work remains to

outline a workable and humane approach to enhancing opportunities for inmate sexual expression, this article serves as an initial step in that direction. *HRB*

ENDNOTES: Analyzing Prison Sex

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¹ Prison Rape Elimination Act of 2003, 45 U.S.C. § 15601 (2003) [hereinafter PREA].

² *Id.* at §§ 3(3), 7.

³ See Allen J. Beck and Timothy A. Hughes, U.S. Dep't of Justice, Office of Justice Programs/Bureau of Justice Statistics, *Prison Rape Elimination Act of 2003, Sexual Violence Reported by Correctional Authorities, 2004* (July 2005) at 10-12.

⁴ See PREA § 4(b)(3)(A). States with a credible grievance process and aggressive investigation may have higher reporting than states with poor investigation procedures and compromised grievance processes. "We need to encourage the reporting of prison rape, and those states that take the problem seriously enough to use expansive definitions of rape and broad data collection methodologies — despite the risk of being penalized — should be applauded, not criticized." See generally Michele Deitch, *Austin American Statesman*, "Deitch: On Prison Rape, Texas Tries to Report it Right" (Nov. 9, 2005), available at http://www.statesman.com/opinion/content/editorial/stories/11/9/prisonrape_cdir.html (accessed May 14, 2006).

⁵ See PREA § 8(c)(2).

⁶ *Id.* at §§ 3, 9.

⁷ *Id.* at § 9. "The term rape means — (A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will; (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury." *Id.*

⁸ *Id.* at § 3(2)(A).

⁹ See Beck and Hughes, *Sexual Violence* at 3.

¹⁰ *Id.* at 2.

¹¹ See U.S. Dep't of Justice, Office of Justice Programs/Bureau of Justice Statistics, *Revision of a Currently Approved Collection (Pre-testing Activities for Surveys Implementing the Prison Rape Elimination Act of 2003, OMB No. 1121-0303)* (Nov. 10, 2005) (on file with the author).

¹² "Consensual sodomy and oral copulation among inmates is prohibited by subdivision (e) of Section 286 and subdivision (e) of Section 288a, respectively. Without repealing those provisions, the increased scrutiny provided by this article shall apply only to consensual sexual contact among inmates and custodial sexual misconduct." Cal. Sexual Abuse in Detention Elimination Act, § 2639(f), 2005 Cal. Adv. Legis. Serv. 303 (Deering).

¹³ "[T]he commissioner has heard me speak about the challenges of implementing the Prison Rape Elimination Act at Notre Dame in March when I emphasized there the need to grapple realistically with prisoners' sexuality and with the grim fact that rape is essentially the only socially acceptable sexual outlet in many men's prisons." Lara Stemple, Executive Director, Stop Prisoner Rape, *Address at the Public Hearing before the National Prison Rape Elimination Commission*, "The Costs of Victimization: Why Our Nation Must Confront Prison Rape" (June 14, 2005), available at http://www.nprec.us/docs/MoralandEthicalQuestions_V1_1.pdf (accessed May 14, 2006).

¹⁴ *Lowrey v. Honeycutt*, 2006 U.S. Dist. LEXIS 12348 (2006), discussed an inmate's Eighth and Fourteenth Amendment challenges to a sexual assault exam and a disciplinary report for engaging in consensual sex with another inmate.

¹⁵ "National studies have shown that about 30% of incarcerated men will have sex during their terms, even though it is illegal in California and most other states." Editorials Pages Desk, *L.A. Times*, "Punish But Protect," (Mar. 18, 2006) at B16.

¹⁶ "A love affair of a member of staff and a prisoner within a prison cannot be approved, the reason being that the parties are not equal." Penal Reform International, *Making Standards Work: an international handbook on good prison practice* 160 (1995).

¹⁷ See CNN.com, "Dragnet out for fugitive and wife, both escape in hail of gunfire that killed guard," www.cnn.com/2005/US/08/09/inmates.escape/index.html (Aug. 10, 2005); Tennessean.com, "Westgate sheriff guilty of aiding

flight of inmate pregnant by jailer," <http://www.tennessean.com/apps/pbcs.dll/article?AID=/20051028/NEWS03/510280405/1017/NEWS> (Oct. 28, 2005).

¹⁸ See Cristina Rathbone, *A World Apart, Women, Prison and Life Behind Bars* 59 (2005), for a description of a sex-for-cigarettes scandal where women inmates agreed to correctional staff's fondling in exchange for cigarettes.

¹⁹ "If a boss wants to stop, I'll give her a couple of months. But you never let them quit. An inmate can always threaten to go to rank, and if that don't work then I tell him something like, 'I ain't got but 15 months to go before I discharge. I know you love your kids. I'd hate to see them get hurt.' Bosses with kids won't want anything to happen to their family." Robert Worley, James W. Marquart, and Janet L. Mullings, *Prison Guard Predators: An Analysis of Inmates Who Established Inappropriate Relationships with Prison Staff, 1995-1998*, 24 *Deviant Behavior: An Interdisciplinary Journal* 175, 186 (2003).

²⁰ See Janet Shibley Hyde and Sara R. Jaffee, *Becoming a Heterosexual Adult: The Experiences of Young Women*, 56 *J. Soc. Issues* 283, 287, 290 (2000).

²¹ Sentenced men and women may initially think of their separation from family and of the age they will be when they are released; however, they may not consider the impact of imprisonment on fertility. In that sense, loss of fertility becomes a collateral consequence of imprisonment. Some women have voluntarily engaged in sexual relations with staff to conceive, either because they are serving long sentences and fear they will not be able to bear children once they have completed their incarceration or because they are attempting to "replace" children that have been lost due to their incarceration or termination of parental rights. See Interview by Tracey Payne Wilson with Elaine Lord, Warden for the Bedford Hills Correctional Facility from 1995-2005, transcript available in *Our Place*, 4 *Finding Our Place* (2003) at 23, available at <http://www.ourplacedc.org/images/newslet/OurPlaceFall03.pdf> (accessed Apr. 6, 2006).

²² Criminality was seen as a mental illness through which it was possible to predict the behavior of children by looking at the trajectory for their parents. Nicole Hahn Rafter and Debra L. Stanley, *Prisons in America* 10-13 (1999).

²³ 291 F.3d 617 (9th Cir. 2002).

²⁴ See *id.* at 623. Great Britain believes that the privilege of allowing a prisoner to artificially inseminate his wife should be allowed in exceptional circumstances but is still attempting to define the instances where this would occur. Pollybeth Proctor, *Procreating from Prison: Evaluating British Prisoners' Right to Artificially Inseminate Their Wives Under the United Kingdom's New Human Rights Act and the 2001 Mellor Case*, 31 *Ga. J. Int'l & comp. L.* 459, 472 (2003).

²⁵ Mr. Gerber was serving life without parole as a result of the "three strikes" law in California and was ineligible for California's conjugal visiting program.

²⁶ See Proctor, *Procreating from Prison* at 486, which compares and contrasts the United Kingdom's and the United States' approaches to procreative freedom for prisoners.

²⁷ Some inmates new to the system find a "mentor" in an effort to adjust to prison life, and those women who are "[l]eft to their own devices are women who do not possess the skills for negotiating a bureaucracy, the prison smarts to work the system, nor a 'protector' who watches out for them." Barbara Owen, "In the Mix: The Culture of Imprisoned Women," 157-58, in Craig Hemmens and Mary Stohr, eds., *The Inmate Prison Experience* (Prentice Hall 2003).

²⁸ *Richardson v. Penfold*, 839 F.2d 392, 394 (7th Cir. 1988), described an incident where a victim of prison rape was informed that his assailant "had 'sold' him" to another inmate who subsequently raped him.

²⁹ See Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 *J. Sex Res.* 67, 67-68 (1996); Cindy Struckman-Johnson and David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 *J. Sex Res.* 217, 379 (2002).

³⁰ Forty-two percent of the allegations of sexual violence reported nationwide in 2004 involved staff sexual misconduct; 37 percent involved inmate-on-inmate nonconsensual sexual acts; 11 percent involved staff sexual harassment; and 10 percent involved abusive sexual contact. These numbers are suspect due to varying definitions, poor recordkeeping, poor investigations, and compromised grievance processes. Beck, *Sexual Violence* at 1. Sexual abuse of female inmates is both underreported and alarmingly prevalent. See U.S. Dep't of Justice, Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates* 3 (2005).

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³¹ A variety of legal sanctions, including arrest, referral for prosecution, or new sentence, were imposed on perpetrators of inmate-on-inmate sexual violence in 86 percent of the 36 prison systems, 76 percent of the 42 jail facilities, 70 percent of the 27 state-operated juvenile systems and 50 percent of the 40 local, private juvenile facilities, whereas 90 percent of staff perpetrators of sexual misconduct were discharged or referred for prosecution. Beck, *Sexual Violence* at 9.

³² *Id.*

³³ Many correctional officials believe that encounters of sexual violence between staff and inmates begin as consensual relationships that become coercive over time. Owen, *In the Mix* at 15.

³⁴ *Id.* at 28-29.

³⁵ *Lawrence v. Texas*, 539 U.S. 558, 565 (2003), noted that “[a]fter *Griswold*, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), recognized the right to “bear or beget a child” as fundamental.

³⁶ *Skinner v. Oklahoma*, 316 U.S. 535, 542-543 (1942), held that the right to procreate is a fundamental right guaranteed by the Constitution.

³⁷ *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 530 (3rd Cir. 1987), held that prisoners have a right to get needed medical treatment, including abortions.

³⁸ Owen, *In the Mix* at 8.

³⁹ *Id.* at 9.

⁴⁰ PREA is replete with references to the public health impacts of prison rape. “HIV and AIDS are major public health problems within America’s correctional facilities. In 2000, 25,088 inmates in federal and state prisons were known to be infected with HIV/AIDS. In 2000, HIV/AIDS accounted for more than 6 percent of all deaths in federal and state prisons. Infection rates for other sexually transmitted diseases like tuberculosis and hepatitis B and C are also far greater than for the American population as a whole. Prison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims.” PREA § 2(7). The high incidence of prison rape “increases health care expenditures, both inside and outside of prison systems, and reduces the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases.” *Id.* at § 2(14)(c). Prison rape also affects interstate commerce because “the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases, contributing to increased health and medical expenditures throughout the nation.” *Id.* at § 2(15)(B).

⁴¹ Laura M. Maruschak, U.S. Dep’t of Justice, Office of Justice Programs/Bureau of Justice Statistics, *HIV in Prisons, 2003, Bulletin* (Sept. 2005) at 1.

⁴² Policies and programs focus “on supportive family relationships or benefiting the children of inmates.” Nat’l Inst. of Corr., U.S. Dep’t of Justice, *Services for Families of Prison Inmates: Special Issues in Corrections* 1, 6 (2002), available at <http://www.nicic.org/pubs/2002/017272.pdf> (accessed May 14, 2006).

⁴³ Studies have supported the idea that increased contact between inmates and their families contribute to an inmate’s re-integration into the community. *Id.* at 1.

⁴⁴ See generally *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984). In Spain, prisoners’ visits can be suspended if any of the following circumstances are present: inappropriate behavior, evidence of the preparation of a criminal act, or acts against the order or the safety of the institutions. Dirk van Zyl and Frieder Dünkler, eds., *Imprisonment Today and Tomorrow, International Perspectives on Prisoners’ Rights and Prison Conditions* 621 (2nd ed., 2001) [hereinafter *Imprisonment Today*].

⁴⁵ Conjugal visits may alleviate sexual tension and therefore reduce homosexuality. Bonice E. Carlson, *Encyclopedia of American Prisons* 105, 106 (1996).

⁴⁶ One benefit of legalized prostitution is the corresponding health regulations designed to prevent disease outbreak. See Susan E. Thompson, *Prostitution – A Choice Ignored*, 21 Women’s Rts. L. Rep. 217, 227 (2000). Legalization of prostitution in Nevada has created an environment where the “incidence of disease among licensed prostitutes is virtually zero.” Ashley Bollinger, *Regulating the World’s Oldest Profession: Criminalization, Decriminalization or Legalization – What is Best for Working Women vs. What Will Work in the United States?* 34 (unpublished student paper on file with author) (2005); Jenna Casper, *Prostitution: A Celebration or Degradation of Women* 10 (unpublished student paper on file with author) (2005).

⁴⁷ See generally Dirk Johnson and Julie Scelfo, *Newsweek* “Sex, Love and Nursing Homes” (Dec. 15, 2003) at 54; Janet K. Feldkamp, *Navigating the Uncertain Legal Waters of Resident Sexuality*, 52 Nursing Homes: Long Term Care Management 62 (2003). “People with mental retardation and related

developmental disabilities, like all people, have inherent sexual rights and basic human needs. These rights and needs must be affirmed, defended and respected.” The Arc, *Position Statement: Sexuality* (2004) at 1, available at <http://www.thearc.org/posits/sexualitypos.doc> (accessed Apr. 6, 2006).

⁴⁸ *Roper v. Simmons*, 541 U.S. 1040, 1198 (2004), cited international law standards in finding that execution of individuals under eighteen years of age violates the Eighth Amendment. *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003), used international law in holding that a Texas statute making it a crime for two persons of the same sex to engage in consensual sodomy in privacy was unconstitutional. *Hamdan v. Rumsfeld*, 367 U.S. App. D.C. 265 (2005), cited the Geneva and Hague Conventions in finding that Yaser Hamdi was entitled to a reasonable opportunity to challenge the factual basis of his detention as an “enemy combatant.”

⁴⁹ “[E]very day the lives and the physical integrity of lesbian, gay, bisexual and transgender people are at stake within our prison systems, and what they face is torture, and our government is complicit in it and in many cases responsible for it.” *Hearing on the Prison Rape Reduction Act of 2002 Before the Senate Committee on the Judiciary*, 107th Cong. (2002) (statement of Dr. Scott Long), available at http://www.nprec.us/docs/sf_atrisk4_slongstatement.pdf (accessed Apr. 6, 2006). See also *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, annex I, adopted Aug. 30, 1955; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 [Part I Only].

⁵⁰ *Standard Minimum Rules for the Treatment of Prisoners* at annex II(A)(60)(1) (1977), available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm (accessed Apr. 6, 2006). See also Article 1 of the *Basic Principles for the Treatment of Prisoners*, which states that “[a]ll prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”

⁵¹ International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

⁵² *Prosecutor v. Kunarac, et. al.*, Case No. IT-96-23, Judgment (Appeals Chamber) (June 12, 2002); Judith Armatta, Coalition for International Justice, “Tribunal Sets New Standard for Rape: Conflict Played ‘substantial part’ in Foca rapes,” www.cij.org (June 12, 2002).

⁵³ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵⁴ American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V./II.82, doc. 6 rev. 1, at art. XXV, XXVI (1992), available at <http://www.cidh.oas.org/Basicos/basic2.htm> (accessed May 14, 2006).

⁵⁵ American Convention on Human Rights, Nov. 22, 1969, art. 5, O.A.S.T.S. No. 36, available at <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed Apr. 6, 2006).

⁵⁶ The U.S. should be “participating in international institutions and legal regimes that promote constructive forms of global interdependence.” Catherine Powell, *Respondent United States Human Rights Policies in the 21st Century in an Age of Multilateralism*, 46 St. Louis L.J. 421 (2002).

⁵⁷ Elizabeth Vasilades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 Am. U. Int’l L. Rev. 71, 79-92 (2005).

⁵⁸ See generally The Ford Foundation, *Close to Home: Case Studies of Human Rights Work in the United States* (2004).

⁵⁹ “[J]udicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.” 2005 House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States, 109 H. Res. 97 (2005), available at <http://judiciary.house.gov> (accessed Apr. 6, 2006).

⁶⁰ *Standard Minimum Rules* at annex II(A)(60)(1). See also *Making Standards Work: an international handbook on good prison practice* at 107.

⁶¹ See e.g., *Imprisonment Today*.

⁶² See generally *Making Standards Work* at 107.

⁶³ *Imprisonment Today* at 201.

⁶⁴ Justice Posner dissented from the court’s decision to uphold cross-gender viewing of inmates by female staff while they were nude. *Johnson v. Phelan*, 69 F.3d 144, 152 (1995) (Posner, J., dissenting).